No. 98-831

UNITED STATES SUPREME COURT
October Term, 1998

ALBUQUERQUE JOURNAL,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	
CESAR GONZALES, *et al.*,	§	
	§	
	§	**CERTIFICATE OF SERVICE**
Respondents.	§	

Pursuant to Supreme Court Rules 33.2, 29.3, and 29.5(b), the undersigned hereby certify that the undersigned counsel Marc H. Robert, is a member of the bar of this Court; that both undersigned counsel represent the parties on whose behalf service is made, and both undersigned counsel have been appointed to represent those parties under the Criminal Justice Act of 1964, See 18 U.S.C. § 3006(A)(d)(6). On December 20, 1998, the undersigned counsel mailed, postage prepaid, from Albuquerque, New Mexico, seven (7) packages containing one copy each of Respondent's Brief in Opposition to Petition for Writ of Certiorari, and one copy of this Certificate of Service, in the captioned case. All parties required to be served have been served. Proper postage was affixed to said envelopes, and they were plainly addressed to the following:

WILLIAM SMITH DIXON
Counsel of Record
CHARLES KIPP PURCELL
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
P.O. Box 1888
Albuquerque, New Mexico 87103
(505) 765-5900
Counsel for Petitioner

JAMES SCARANTINO
P.O. Box 1457
Albuquerque, New Mexico 87103
(505) 766.9028
Counsel for Respondent
David Gallardo

19 pp

JOSEPH RIGGS
420 Central Ave. SW, #200
Albuquerque, New Mexico 87102
(505) 246-9119
Counsel for Respondent
Michael Mora

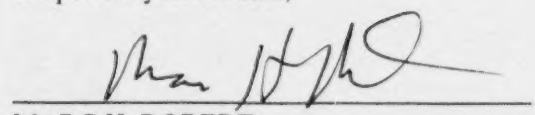
SOLICITOR GENERAL of the UNITED STATES
Room 5614
Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530-0001
(202) 514-2201
Counsel for the United States

THOMAS ENGLISH
P.O. Box 607
Albuquerque, New Mexico 87103
(505) 766-3341
Trial Counsel for the United States

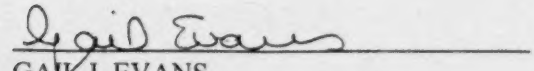
STEVEN G. FARBER
P.O. Box 2473
Santa Fe, New Mexico 87504-2473
(505) 988-9725
Counsel for Amici Curiae
National Association of Criminal
Defense Lawyers and New Mexico
Criminal Defense Lawyers Association

BARBARA E. BERGMAN
1117 Stanford Avenue NE
Albuquerque, New Mexico 87131
(505) 277-3304
Counsel for Amici Curiae
National Association of Criminal
Defense Lawyers and New Mexico
Criminal Defense Lawyers Association

Respectfully Submitted,



MARC H. ROBERT
MARC H. ROBERT, P.C.
202 Central SE, Suite A
Albuquerque, New Mexico 87102
(505) 247-4099
Fax: (505) 242-4055



GAIL J. EVANS
505 Central Ave. NW
Albuquerque, New Mexico 87102
(505) 841-5187

Counsel for Respondents

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STATEMENT OF THE CASE

This dispute arose when the Albuquerque Journal, the biggest daily newspaper in the state of New Mexico, intervened in the largest criminal case ever brought in the state, seeking all of the sealed documents pertaining to expenses incurred under the Criminal Justice Act, 18 U.S.C. § 3006A. The Journal made unprecedented requests, that, if granted, would have revealed confidential defense tactics, privileged attorney-client communications, the attorneys' work product, and much more. The Journal not only sought to know how much money was being spent on attorneys' fees, and on the fees of experts, investigators, paralegals, etc., but also all of the detailed time sheets submitted with each voucher, showing literally on a minute-by-minute basis how attorneys and experts spend their time preparing a defense. The Journal also sought access to the motions and transcripts of *ex parte* hearings in which defense attorneys presented their trial strategies to the judge in support of their applications for appointment of expert assistance. For example, in the death penalty cases, defense teams have had to give detailed showings of the need for a mitigation expert or psychologist to prepare a defense for life in a death penalty trial. The Journal was not satisfied with the disclosure of all of this information at the close of the litigation; the Journal wanted the information immediately, as the defendants literally fought for their lives. In essence the Journal sought, and through this petition continues to seek, the Rosetta stone of the defense.

The Journal's unprecedented and outlandish demands are contrary to the basic principles upon which our criminal justice system are based. The Tenth Circuit fairly and thoroughly crafted a mechanism to provide the Journal all of the information to which it is entitled, at the appropriate time. The Tenth Circuit's opinion rests squarely on the First Amendment and related jurisprudence developed by the Court, and by other circuits' reasoning in cases dealing with CJA documents. The

Journal provides no foundation for further review by this Court.

In an extremely well-reasoned, careful and analytical Opinion entered on July 28, 1998, the Tenth Circuit granted a writ of mandamus for the respondents, and denied the Journal's application for writ of mandamus. App. at 5. The court held as follows:

> (1) there is no qualified first amendment right of access to either the back-up details of the CJA vouchers, or to certain related motions, orders and transcripts; (2) there is no right of access to CJA vouchers or related information pursuant to the common law because, even if relevant common law previously existed on this subject, it has been supplanted by the CJA; and (3) the press has no statutory right of access to the material in question, but the court has discretion to release certain material subject to [certain] conditions.

App. at 4. Applying those legal principles to this case, the Tenth Circuit held that the district court did not abuse its discretion in releasing the total amounts spent at the end of each defendant's case, and that the district court did not abuse its discretion in releasing the CJA vouchers at the close of the entire case, after the last defendant has been sentenced. However, agreeing with every other court that has considered this issue, the Tenth Circuit held that the district court did abuse its discretion when it ordered that at the close of the case, all of the back-up details, motions, orders and transcripts would be released.

In its petition for writ of certiorari, the Journal raises two questions. Both questions demonstrate the Journal's attempts to access the back-up documentation, motions, orders and transcripts of the CJA materials. In the first question, the Journal asks the Court to find a qualified First Amendment right of access to those materials. In the second question, the Journal asks the Court to find that under the CJA statutory scheme, the back-up details, motions, hearings and transcripts should be released at the close of the case. The Journal does not raise a question about the timing of the release of the vouchers. Thus, the Journal appears satisfied with the District Court

and Tenth Circuit decisions that the totals expended will be released after each defendant is sentenced, and that the vouchers themselves will be released after the last defendant is sentenced. The Journal simply refuses to accept that all of the additional, extensive materials it seeks are privileged information that, if released to the public, would put at risk the very principles upon which are criminal justice system is based. The Tenth Circuit articulated this point throughout its opinion.

> The public has an interest not only in the way its funds are used but also in seeing that judicial processes are efficient and that defendants are given the basic tools and raw materials integral to the presentation of an adequate defense so as to ensure a fair trial.

App. at 22 (internal quotations and citations omitted).

The petition misrepresents the state of the jurisprudence addressing this issue. The petition claims that "the Tenth Circuit's decision marks a sharp break from federal appellate precedent concerning the right of the public to monitor the workings of [the criminal justice] system. Other circuits have found a qualified First Amendment right of access to CJA proceedings and documents, including hearings on the appointment of counsel, payment vouchers, and attorneys' time records." Petition at 3. As will be seen below, no federal appellate court has come close to doing what the Journal demands. The Tenth Circuit's opinion, far from representing a "sharp break" with the flow of jurisprudence on this issue, is consistent with other courts' respect for the various interests in the system and the balance required among those interests.

REASONS FOR DENYING THE WRIT

I. THE TENTH CIRCUIT CORRECTLY DECIDED THAT THERE IS NO QUALIFIED FIRST AMENDMENT RIGHT OF ACCESS TO THE CJA DOCUMENTS, BECAUSE THE DOCUMENTS ARE ADMINISTRATIVE, AND NOT JUDICIAL IN CHARACTER.

The Tenth Circuit decided that there is no qualified First Amendment right of access to the

various CJA documents sought by the Journal. In so deciding, the Tenth Circuit did not reject the notion that a right of access may apply to "judicial documents"; instead, the court explained the clear distinction between the CJA documentation at issue and true judicial documents:

> Just as trial related expenditures, reviews, requests, and approvals for funds in the Department of Justice and Federal Public Defender's Offices are administrative, not judicial, function, so is the CJA voucher process. [The CJA vouchers] and the guidelines promulgated for their use by court and counsel, are all generated through the Administrative Office of the United States Court under authority granted to the Judicial Conference of the United States. They are purely administrative. And, the court essentially acts in an administrative, not a judicial capacity when approving voucher requests and related motions for trial assistance. *See, e.g., United States v. Davis*, 953 F.2d 1482, 1498 n. 21 (10th Cir. 1992) ("Fee determinations by the district judge pursuant to the Criminal Justice Act are administrative in character and do not constitute final appealable orders within the meaning of 28 U.S.C. § 1291.).
>
> . . .
>
> [T]he vouchers and related information are not trial documents in any accepted sense of that term. They do not go to the guilt or innocence or punishment of a defendant. They are not evidence of the crime. They are entirely ancillary to the trial.
>
> The fact that the information is filed with the court does not alter the situation. Not all documents filed with a court are considered "judicial documents." *See United States v. El-Sayegh*, 131 F.3d 158, 161 (C.D. Cir. 1997); *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995). *But see Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3d Cir. 1994). And, as indicated, the CJA documents are not directly related to the process of adjudication. The documents are not even related to the defendant's indigent status, for which he or she received CJA aid.
>
> The conclusion that CJA determinations are not trial documents is further supported by the fact that neither prosecutors nor federal public defenders are required to submit to the court documentation of their expenditures in criminal cases. *Cf. United States v. McDougal*, 103 F.3d 651, 656-57 (8th Cir. 1996), *cert. denied*, ____ U.S. ____, 118 S. Ct. 49, 139 L.Ed. 2d 15 (1997).

App. at 15 - 17. The court concluded that "it is clear that no First Amendment right of access applies to CJA documents any more than it applies to administrative documents located in the executive branch." App. at 17 (citations omitted).

The Journal's citation to this Court's opinion in *Forrester v. White*, 484 U.S. 219 (1988) as authority for the notion that the proceedings or documents at issue in this case are judicial is misplaced. First, the portion of the opinion quoted by the Journal is dictum, and thus provides questionable support for the Journal's proposition. In *Forrester*, this Court considered the question of judicial immunity from a wrongful discharge suit against am Illinois state court judge by a probation officer. In the portion of the opinion from which petitioner quoted, this Court said that it had

> "never undertaken to articulate a precise and general definition of the class of acts entitled to immunity. The decided cases, however, suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that that judges may on occasion be assigned by law to perform. Thus, for example, the informal and *ex parte* nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character. See *Stump v. Sparkman*, 435 U.S. 349, 363, n. 12, 98 S. Ct. 1099, 1108, n. 12, 55 L. Ed. 2d 331 (1978).

Forrester, 484 U.S. at 227. Thus, *Forrester* sheds no light on the inquiry before the Court. More importantly, however, the quote begs the question presented by the Journal by *assuming* that the proceedings involved there were judicial, thus bypassing the precise question presented here.

Similarly, the Journal seems to argue that the district judge's handling of CJA vouchers is analogous to a ruling on the admissibility of trial evidence, citing *United States v. Porter*, 988 F. Supp. 519 (M.D. Pa. 1997). In that case, the district court decided that an indigent defendant's applications for issuance of process to secure the attendance of witnesses at trial were subject to disclosure. The court found that the situation of the indigent did not materially differ from that of the non-indigent, since both had to present the witnesses at trial, and had to show the admissibility of the evidence. *Id.* at 527. The *Porter* case is inapposite to the legal and factual questions engaged

in this case.

The Journal's petition incorrectly asserts that this case gives the court an opportunity to explicitly recognize for the first time the First Amendment right of access to judicial documents. The Journal's position assumes that the documents at issue are "judicial documents" such as would compel the recognition of such a right. However, the CJA documents at dispute are not judicial documents; certainly, they cannot be analogized to more obvious judicial documents such as substantive pre-trial motions, for example motions to suppress or motions to sever, or exhibits filed in support of such motions. A case presenting the question of a qualified right of access to such substantive documents, intrinsic to the adversarial process, is the proper vehicle for the determination sought by the Journal. In contrast to such a case, this case does not clearly deal with judicial documents.

Essentially, this case deals with a very particular type of document which the Journal calls "judicial" simply due to a quirk in the CJA which calls for a district court judge, rather than a federal public defender, an administrator, or a committee, to review requests for funding made by CJA defendants. The Tenth Circuit found, as the first of several alternative findings, that the CJA documents are not judicial documents, but rather are administrative documents to which there is no First Amendment right of access. The Tenth Circuit's finding is reasonable and consistent with the facts of this case and with the CJA. Accordingly, this case does not present an opportunity to make an effective determination of the public's First Amendment right of access to "judicial" documents.

II. EVEN IF THESE WERE JUDICIAL DOCUMENTS, THE TENTH CIRCUIT'S HOLDING THAT THERE IS NEITHER A FIRST AMENDMENT NOR A STATUTORY RIGHT OF ACCESS TO THE CJA INFORMATION IS CORRECT, AND IN ACCORD WITH ALL OTHER COURT DECISIONS.

Although holding that no First Amendment right of access to the CJA documents exists because the documents are not judicial, the Tenth Circuit went on to assume *arguendo* that the documents were "judicial documents". The Tenth Circuit then proceeded to properly apply the "experience and logic test" established by this Court in *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986), and found that under that test, no qualified right of access exists to the documents at issue. In so doing, the Tenth Circuit found that "no history, experience or tradition of access exists as to the release at any time of backup documentation, motions, orders and hearing transcripts regarding requests for CJA assistance." App. at 24 - 25. The court also found that public access would not play a significant positive role in the functioning of the CJA process. App. at 25 - 33. [1] Thus, in finding that the CJA documentation met neither the experience nor the logic test, the court found that there does not exist a first amendment right of access to the CJA documents at question.

While the Journal concedes that "no other circuit had previously addressed the accessibility of each of these categories," petition at 14, it blithely argues that the Tenth Circuit's decision is at odds with the decision of other circuits. The Journal's claim is flatly untrue. In fact, the Tenth Circuit's decision is in accord with First Amendment jurisprudence developed by this Court, and with the statutory scheme applicable to this case. Moreover, the Tenth Circuit's decision is consistent with other courts which have considered questions analogous to this case.

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[1] The Tenth Circuit pointed out that the Journal, in purporting to advance the right of the public to know the amount spent on the administration of a significant and newsworthy criminal prosecution, ignores the plain fact that disclosure of CJA backup documents would utterly fail to achieve that goal. App. at 14. Prosecution costs and costs incurred by the Federal Public Defender are beyond the reach of the media, and constitute the "bulk of public funds spent on criminal prosecutions involving indigent defendants". App. at 15. Thus, the aim of public education simply could not be accomplished by the Journal's access to the information sought. Indeed, such access would present an incomplete and distorted view to the public.

The Journal continues to hang its tattered hat on *United States v. Suarez*, 880 F.2d 626 (2nd Cir. 1989). In *Suarez*, the Second Circuit explicitly noted that the media was not attempting to access the detailed time sheets, but rather, but sought only the cover sheets (CJA forms 20 and 21) "which [are] a summary cover-sheet listing the amounts sought and approved for payments with the detailed back-up material attached thereto." 880 F.2d at 630. As the Journal correctly notes, the *Suarez* court found "a right of access to orders of a judicial officer, in connection with a criminal proceeding, that approve payments of public funds to private attorneys or firms." *Id.* at 632. However, that finding goes no further than did the Tenth Circuit in this case. The Tenth Circuit's affirmance of the trial courts decision to release the CJA vouchers, showing the total amounts expended by attorneys and all other individuals working on the defense, is in accord with *Suarez*. The Journal's suggestion that the *Suarez* decision supports its requests for attorneys' time sheets, motions, and transcripts of hearings where CJA matters are discussed is disingenuous, to say the least. Although the Journal writes that "*Suarez* cannot be reconciled with the Tenth Circuit's sweeping and everlasting impoundment of every kind of CJA documents except vouchers," petition at 15, the Tenth Circuit's decision mirrors that in *Suarez* – all the attorneys' time sheets, motions and transcripts of hearings will be filed and remain under seal, pursuant to the CJA, with no media entity even attempting to employ a bankrupt first amendment argument to access them.

The Journal's tortured efforts to create a circuit split with reference to other cases fall similarly short of the mark. The Journal argues that the Tenth Circuit's decision conflicts with the Eleventh Circuit's decision in *United States v. Ellis*, 90 F.3d 447 (11th Cir. 1996). Petition at 16. In *Ellis*, the defendant, having retained counsel for trial, sought appointed counsel for the appeal of his district court conviction. The district court conducted an *in camera* hearing to consider the

defendant's application, at which hearing the defendant's finances, and his financial arrangements with his retained trial counsel, were explored. The Fernandina News-Leader sought to obtain entrance to, or a transcript of, the *in camera* hearing. Following the hearing, the district court determined that unsealing the transcript would not violate the defendant's privacy interests, or those of his retained trial counsel, and ordered that the transcript be unsealed. The defendant appealed that decision, arguing that the CJA required that the transcript be sealed in perpetuity.

The Eleventh Circuit affirmed the order unsealing the transcript, finding that the language of the CJA did not require perpetual sealing of the hearing transcript. *Ellis*, 90 F.3d at 450. Significantly, the court noted that Ellis did not raise any arguments that any privileged information would be released in unsealing the transcript, or that he would be otherwise prejudiced. *Id.* It appears that Ellis simply argued that the CJA required perpetual sealing, and that it was "unreasonable" to expose private financial matters. *Id.* at 450-51. Thus, the *Ellis* court never considered the issues on which the Tenth Circuit based its decision.

The information sought by the media in *Ellis* was of an entirely different character from that involved in the instant case. There, the only information involved related to the assets of the defendant and the fee paid to his trial lawyer, matters with respect to which no privilege can be said to attach, and no prejudice other than possibly embarrassment can be invoked. In contrast, the Journal seeks information which goes to the heart of the attorney-client relationship; which exposes non-party witnesses to public scrutiny; and which could expose people, some wholly uninvolved in the criminal prosecution, to danger. Because *Ellis* does not address the kind of information sought here, that case cannot be said to conflict with the analysis of the Tenth Circuit below.

More fundamentally, the Journal erroneously interprets *Ellis* to find a First Amendment right

of access to the CJA hearing. Petition at 16. The *Ellis* court noted a qualified right to attend criminal trials, *Ellis*, 90 F.3d at 450, and said that it would interpret the CJA "to avoid conflict with the First Amendment." *Id.* However, that court did not find a First Amendment right, qualified or otherwise, of access to the transcript, holding instead that the relevant CJA provisions did not bar its unsealing. *Id.* at 451. The Journal's claim that the *Ellis* court created or recognized a First Amendment right of access to the information at issue in that case cannot be supported.

Ellis dealt with issues and documents fundamentally different from those involved in this case. The *Ellis* holding is not inconsistent with that of the Tenth Circuit in this case. The Journal's claim of a conflict with the Eleventh Circuit is without merit.

The Journal's assertion of a conflict with the Ninth Circuit's decision in *Seattle Times Co. v. United States District Court*, 845 F.2d 1513 (9th Cir. 1988) is likewise unfounded. In *Seattle Times*, the trial court released redacted documents filed in connection with the government's motion to detain the defendant, and declined to unseal at all financial documents submitted by the defendant to the trial court in support of her application for appointed counsel. *Id.* at 1514. The newspaper sought release of all of the documents. The government argued that the memoranda submitted on the issue of detention should not be subject to the press' qualified right of access. However, the government did *not* make the same argument with respect to the financial information, leaving the Ninth Circuit to assume, in a footnote, that the financial "affidavits are pretrial documents subject to the right of access under the general rule expressed in [*United States v.*] *Brooklier*, [685 F.2d 1162 (9th Cir. 1982)]." *Seattle Times*, 845 F.2d at 1516, n. 1. The remainder of the *Seattle Times* opinion addresses the public's right of access to information regarding a defendant's dangerousness and risk of flight, which the court characterized as matters peculiarly important to the public, and relevant

to public safety. The opinion does not otherwise address the only issue common to those presented in the case at bar. Because *Seattle Times* is largely inapposite to this case, the Tenth Circuit's decision below cannot plausibly be said to conflict with it. The Journal's ambitious claim that the *Seattle Times* opinion found a First Amendment right of access to the financial affidavit must charitably be viewed with skepticism. The Journal's proposition fails to provide a basis on which to grant its petition.

The Journal's fall back position is that the CJA itself provides for the release of the Rosetta stone of the defense to the public. As both the District Court and the Tenth Circuit found, a simple reading of the CJA and the Guidelines issued by the Judicial Conference of the United States to administer the CJA show that the Journal's position is clearly wrong:

> Ex parte applications for services other than counsel under [18 U.S.C. § 30006A], subsection (e) shall be heard in camera, and shall not be revealed without the consent of the defendant. The application shall be placed under seal until the final disposition of the case in the trial court, subject to further order of the court. *Maintaining the secrecy of the application prevents the possibility that an open hearing may cause a defendant to reveal his or her defense.*

VII Administrative Office of the United States Court, Guide to Judiciary Policies and Procedures, Chap. III, Part A, Section 3.03 (emphasis added) (cited by Tenth Circuit at App. 40). The Tenth Circuit held that "[p]ursuant to the CJA statutory and regulatory scheme, we conclude that this information is presumptively closed." App. At 41.

> The scheme favors continuing confidentiality of the information , and given the interests identified in the discussion of the logic prong of the constitutional analysis above, we conclude that the district court abused its discretion in ordering that the motions, orders, and hearing transcripts related to service other than counsel be released.

Id.

The Tenth Circuit noted that the District Court had ordered the release of the documents only after finding a qualified first amendment right of access to those documents, id.; neither the District Court nor the Tenth Circuit found that there was any right of access to the documents under the statutory scheme. The Tenth Circuit discussed numerous interests and rights of the defendants and witnesses which would be violated if the documents were ever disclosed, including witness protection, witness privacy, disclosure of privileged information provided by the defendants, and disclosure of information protected by the attorney-client privilege and attorney work-product doctrine. App. At 43-45. Because these privileges and rights continue past the completion of the case, the Tenth Circuit correctly held that it would be error to release these documents at the conclusion of the case. App. At 45.

Under the statutory scheme, the Tenth Circuit held that the total amount spent should be released after each defendant is sentenced, and that the vouchers themselves (without the back-up documentation) showing the amounts paid pursuant to explanatory categories, to attorneys and all members of the defense teams, should be released after the last defendant is sentenced. App. at 46-48. The Journal's argument under both the First Amendment and the statutory scheme that it should have access to more than the totals spent and the vouchers have never been accepted by any court. The Tenth Circuit's holding is strong and accurate. There is no need for review by this Court.

III. THIS CASE DEMANDS A HIGHLY FACT SPECIFIC INQUIRY WHICH THE DISTRICT COURT AND APPELLATE COURT HAVE ALREADY THOROUGHLY ADDRESSED; IT IS NOT A FACTUAL INQUIRY APPROPRIATE FOR REVIEW BY THIS COURT.

Significantly, the trial judge has personally reviewed each and every one of the documents at issue. On a line by line basis in which each time entry is divided into minute increments, the

District Court has determined whether attorneys' time sheets were reasonable and thus, should be paid in full or cut. Likewise, before approving funds for a member of the defense team, such as an expert or a paralegal, the Court initially requires a detailed explanation as to why the work is necessary at all; subsequently, upon turning in vouchers for payments, the Court painstakingly has reviewed each and every entry of each defense team members' bills before approving (or not approving) them for payment. As the Tenth Circuit recognized, such an exacting standard is required by the law, since funds are only to be expended if required to obtain basic tools necessary for an adequate defense. *See Ake v. Oklahoma*, 479 U.S. 68, 76 (1985). Although the district court judge ruled that the CJA information should be released at the end of the entire case, she recognized the profound difficulties occasioned by that course of action:

> The CJA process established by Congress interjects federal courts into the attorney-client relationship between criminal defendants and defense counsel. If the public is allowed unfettered access to this privileged information, even post-trial, indigent criminal defendants seeking representation through the CJA proceeds effectively would be forced to waive any privilege in communicating information to their CJA attorneys. Moreover, such a rule would require defendants to choose between waiving their Fifth Amendment rights against self-incrimination or keeping important information from their CJA attorneys. This choice may seriously hamper a criminal defendant's ability and desire to help the CJA attorney to prepare an adequate defense, raises important due process, effective assistance of counsel and equal protection concerns.

Order Granting In Part Defendants' Motion to Stay Execution of Court's February 11, 1997 Order Pending Appeal, filed July 31, 1997 (App. at 88). The trial judge went on to explain that "[t]hese constitutional ramifications are even more pertinent in the high-profile case at bar where, in an effort to ensure that taxpayer dollars are used frugally, the court has required Defendants to make detailed disclosures in motions, hearings, and vouchers before the Court will authorize activities or reimburse Defendants for expenses...[D]isclosing privileged information and information of constitutional

significance at any time will tend to chill future CJA defendants' exercise of these important rights." *Id.* (App. at 89)

Similarly, in holding that the District Court abused its discretion in ordering the wholesale release of all of the CJA materials at the close of the case, the Tenth Circuit considered the option of redacting those portions of the materials that contain privileged information or information of constitutional significance, and found that redaction is not a solution. The Tenth Circuit "review[ed] many of the materials contained in the record of this case," App. at 32, and disagreed with the Journal's position that the Court should selectively redact any information which hurts the CJA process. Agreeing with the District Court, the Tenth Circuit found that "the hearing transcripts, motions, orders, and backup documentation are replete with sensitive information, the release of which would harm the CJA process . . ." App. at 32. The Tenth Circuit succinctly wrote:

> Requiring the release of the requested materials would entail an extensive - not to mention expensive - use of court and counsel effort by forcing counsel to be more careful in the information presented to the court for fear of future disclosure and by forcing the court and counsel to ensure that most of the information in the CJA materials is ultimately redacted. Especially in a high profile case like this one, effective, efficient, and fair procedures must be employed. Access only to those portions of the materials that do not contain the implicated information would be a Pyrrhic victory for access, with little benefit to the functioning of the system.

App. at 33 (citations omitted).

IV. DISCLOSING THE INFORMATION SOUGHT BY THE JOURNAL WILL NOT ANSWER QUESTIONS OF VITAL PUBLIC CONCERN, BUT RATHER WILL PROVIDE ONLY PARTIAL INFORMATION ABOUT THE COSTS OF A VERY SMALL PERCENTAGE OF CRIMINAL CASES.

> [T]o the extent the Journal bases its arguments on a claim that the public has a right to know how public funds are being spent in individual criminal cases, its logic is spoiled by the facts. The Journal does not seriously dispute that it cannot get the type of data it seeks here from the Department of Justice with respect to prosecution costs, or from Federal Public Defender Offices (which handle up to 75% of the indigent

> defendant caseload in districts where such offices are located). Those two sources of expenditures, when combined, account for the bulk of public funds spent on criminal prosecutions involving indigent defendants - all unavailable to the press in the type of detail sought here.

July 28, 1998 opinion, App. at 14 - 15. The Tenth Circuit thus points to a significant flaw in the Journal's policy arguments in support of its position. There are others. The public's right to know the manner in which public funds are spent is satisfied by the disclosure of the CJA "cover sheets", the forms 20, 21, 20 and 31, which the district court and the Tenth Circuit ordered be released at the end of each defendant's case. Thus may the public learn of the amount of money spent on lawyers and experts in the defense of the defendant; there is no need to open the backup documentation to public scrutiny.

In fact, any disclosure of the CJA expenses actually fails to contribute to public understanding of the operation of the criminal justice system, the policy aim urged by the Journal. Disclosure of the voucher totals will only tell the paper's subscribers how much money was paid from the public fisc in the defense of the accused; however, the other side of the equation, the costs to investigate and prosecute the case, are forever shielded from the public's view. Nor will the disclosure of CJA expenditures broaden the public's understanding of the costs involved in such a defense, since CJA payments are frequently significantly out of line with the fees charged by retained counsel. Disclosure of only one part of one side of the costs of the process will likely skew the public's perception of defense costs, rather than broaden it.

Finally, and perhaps most importantly, the Tenth Circuit recognized that the requirement of disclosure of the detailed backup documentation to the CJA vouchers will impair the administration of justice and the quality of the judicial process. App. 24-33.

V. CONGRESS HAS ADDRESSED THE ISSUES RAISED BY THE JOURNAL'S PETITION; THUS, THERE IS NO NEED FOR INTERVENTION FROM THIS COURT.

As the Tenth Circuit pointed out in its opinion, the CJA has been amended twice since the present case was commenced, and the amendments "indicate a shift toward increased access to the amount paid out under the CJA." App. at 38, footnote 21. Indeed, the CJA now has a full section entitled "Disclosure of Fees," which begins with the provision that "the amounts paid under the subsection for services in any case shall be made available to the public by the court upon the court's approval of their payment." 18 U.S.C. § 3006A(d)(4)(A). Thus, under the amended CJA (which is not applicable to this case), the public has access to the vouchers during the pendency of the case, something not previously allowable. However, when considering whether to allow public access to the back-up documentation, Congress has come to the same conclusion as the courts. As the Tenth Circuit noted, the amendments to the CJA are "informative in that they do not indicate a legislative desire to release the other CJA information which the Albuquerque Journal is seeking here. The legislative history of the amendments indicates that the change was intended to reach the *amounts* listed on the CJA vouchers, but not the backup documentation or other CJA-related documents." App. at 39, footnote 21. According to the sponsor of the bill, "clearly if this information were subject to public disclosure the alleged criminal's sixth amendment rights might be compromised. My bill does not seek to make this sensitive information subject to public disclosure, but rather continues to leave it to the Judge to determine if and when it should be released." 143 Cong. Rec. S8069-70 (daily ed. July 24, 1997 (statement of Sen. Domenici) (cited in App. at 39, footnote 21). The Journal tries to make short shrift of these amendments by merely mentioning them in a footnote (Petition for Certiorari at 5, footnote 1), and stating that the amendments "neither undermine the

importance of this case nor obviate the need for the Court to decide it." *Id.* However, the fact that Congress has considered on a regular basis the question of public access to CJA information, and made decisions toward greater access while still protecting the constitutional rights of indigent defendants certainly means there is no need for this Court to involve itself in the factual dispute of this case, which will not have far reaching implications for other cases since legislation will address these issues in current and future cases.

CONCLUSION

For the reasons set forth herein, the petition should be denied.

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Respectfully submitted,

GAIL EVANS
505 Central N.W.
Albuquerque, N.M. 87102
(505) 841-5187

MARC H. ROBERT
MARC H. ROBERT, P.C.
202 Central Ave., SE, Suite A
Albuquerque, New Mexico 87102
(505) 247-4099
Fax (505) 242-4055